

MICHAEL JOSEPH PRATT,)	No. C 03-2536 JF (PR)
)	
Plaintiff,)	ORDER GRANTING MOTION
)	TO DISMISS; DENYING
vs.)	MOTIONS TO STAY AND FOR
)	APPOINTMENT OF COUNSEL
)	
E. ALAMEIDA, et al.,)	
)	
Defendants.)	(Docket Nos. 20, 22, & 27)
)	

Plaintiff makes the following allegations in the March 5, 2004 Amended Complaint, which allegations the Court assumes to be true for purposes of the present motion. On October 4, 2002, he gave a petition for a writ of habeas corpus, a writ of mandate, a motion for discovery, and related exhibits to Defendant SVSP Senior

1 Librarian Burk for photocopying. Plaintiff's documents were misplaced and lost by
2 SVSP prison officials. Plaintiff filed an administrative appeal regarding the loss of his
3 property, which was partially granted. See Amended Complaint at 2-6. Plaintiff admits
4 that he was thereafter able to resubmit his habeas petition in the United States District
5 Court for the Eastern District of California and that his habeas petition was reviewed. Id.
6 at 7.

7 Plaintiff claims that after he complained about the destruction of his habeas
8 petition, SVSP prison officials retaliated against him by taking away his seizure
9 medication in order to prevent him from reconstructing his habeas petition and from filing
10 a civil complaint. Plaintiff has taken this medication his entire life to control epileptic
11 seizures. After the removal of this medication, Plaintiff suffered seizures resulting in
12 injuries to his head, back, right elbow, and left shoulder. Amended Complaint at 9.

13 After reviewing the Amended Complaint pursuant to 28 U.S.C. § 1915A, the Court
14 found that it stated two cognizable claims for relief against Defendants Edward Alameida,
15 Director of the California Department of Corrections and Rehabilitation at the relevant
16 time period; G.K. Crawford, SVSP Supervisor of Vocational Instruction; A.A. Lamarque,
17 SVSP Warden; and J. Burk, SVSP Law Librarian: (1) that Defendants violated his First
18 Amendment rights by retaliating against him for the filing of administrative grievances;
19 and (2) that Defendants violated his Eighth Amendment rights by being deliberately
20 indifferent to his serious medical needs. The Court dismissed Plaintiff's remaining claims
21 for failure to state a cognizable grounds for relief. Defendants argue in their motion to
22 dismiss that Plaintiff did not exhaust his retaliation or medical claims prior to filing this
23 action.

24 DISCUSSION

25 A. Standard of Review

26 Nonexhaustion under 42 U.S.C. § 1997e(a) is an affirmative defense; defendants
27 have the burden of raising and proving the absence of exhaustion. Wyatt v. Terhune, 315
28 F.3d 1108, 1119 (9th Cir. 2003). A nonexhaustion claim should be raised in an

unenumerated Rule 12(b) motion rather than in a motion for summary judgment. Id. In deciding a motion to dismiss for failure to exhaust nonjudicial remedies, the court may look beyond the pleadings and decide disputed issues of fact. Id. at 1119-20.¹ If the court concludes that the prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal without prejudice. Id. at 1120.

B. Exhaustion Requirement

The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) ("PLRA"), amended 42 U.S.C. § 1997e to provide that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The exhaustion requirement applies equally to prisoners held in private or government facilities. See Roles v. Maddox, 439 F.3d 1016, 1017-18 (9th Cir. 2006). Exhaustion is mandatory and no longer left to the discretion of the district court. Woodford v. Ngo, 126 S. Ct. 2378, 2382 (2006) (citing Booth v. Churner, 532 U.S. 731, 739 (2001)). "Prisoners must now exhaust all 'available' remedies, not just those that meet federal standards." Id. Even when the relief sought cannot be granted by the administrative process, *i.e.*, monetary damages, a prisoner must still exhaust administrative remedies. Id. at 2382-83 (citing Booth, 532 U.S. at 734).

An action must be dismissed unless the prisoner exhausted his available administrative remedies *before* he or she filed suit, even if the prisoner fully exhausts while the suit is pending. McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002). Furthermore, administrative remedies are not exhausted where the grievance, liberally construed, does not have the same subject and same request for relief. See O'Guinn v. Lovelock Correctional Center, 502 F.3d 1056, 1062-63 (9th Cir. 2007) (even with liberal

¹ If the court looks beyond the pleadings in deciding an unenumerated motion to dismiss for failure to exhaust -- a procedure closely analogous to summary judgment -- the court must give the prisoner fair notice of his opportunity to develop a record. Wyatt, 315 F.3d at 1120 n.14. Plaintiff was given such notice in the order of service.

1 construction, grievance requesting a lower bunk due to poor balance resulting from a
2 previous brain injury was not equivalent to, and therefore did not exhaust administrative
3 remedies for, claims of denial of mental health treatment in violation of the ADA and
4 Rehabilitation Act).

5 The State of California provides its inmates and parolees the right to appeal
6 administratively “any departmental decision, action, condition, or policy which they can
7 demonstrate as having an adverse effect upon their welfare.” Cal. Code Regs. tit. 15,
8 § 3084.1(a). It also provides its inmates the right to file administrative appeals alleging
9 misconduct by correctional officers. See id. § 3084.1(e). In order to exhaust available
10 administrative remedies within this system, a prisoner must proceed through several
11 levels of appeal: (1) informal resolution, (2) formal written appeal on a CDC 602 inmate
12 appeal form, (3) second level appeal to the institution head or designee, and (4) third level
13 appeal to the Director of the California Department of Corrections and Rehabilitation. Id.
14 § 3084.5; Barry v. Ratelle, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997). This satisfies the
15 administrative remedies exhaustion requirement under § 1997e(a). Id. at 1237-38. A
16 prisoner need not proceed further and also exhaust state judicial remedies. Jenkins v.
17 Morton, 148 F.3d 257, 259-60 (3d Cir. 1998).

18 C. Legal Claims

19 Plaintiff’s claims remaining in this action are: (1) that Defendants retaliated
20 against Plaintiff for filing grievances about his lost legal papers by confiscating his
21 epilepsy medication; and (2) that Defendants’ confiscation of such medication, which led
22 to Plaintiff’s seizures and injuries, was deliberately indifferent to his serious medical
23 needs. Defendants argue that Plaintiff failed to administratively exhaust either of these
24 claims before he filed the instant action on May 29, 2003. In his motion for a stay,
25 Plaintiff concedes that he has not exhausted his administrative remedies with respect to
26 these claims, and requests a stay of this case while he exhausts them.

27 A review of the papers submitted by the parties reveals that Plaintiff’s retaliation
28 and deliberate indifference claims have not in fact been exhausted. Plaintiff attaches to

1 his Amended Complaint the administrative grievance he filed on November 22, 2002 in
2 which he complained that the librarian had lost his legal materials on October 4, 2002.
3 Amended Complaint, Ex. A. The grievance was partially granted the next day at the
4 “informal level” of review. Id. The grievance was then granted at the first formal level
5 of review on January 10, 2003, and Plaintiff was given a document that would officially
6 notify the courts that Plaintiff had not been at fault and that Plaintiff could use in
7 explaining his delay to the courts. Id. This grievance does not address the same subject
8 matter as the remaining claims herein, namely that Defendants’ retaliated against him and
9 were deliberately indifferent to his medical needs by confiscating his seizure medication.²
10 As the November 22, 2002, administrative grievance does not concern the same subject
11 matter as the retaliation and deliberate indifference claims raised herein, it does not
12 exhaust those claims. See O’Guinn, 502 F.3d at 1062-63.

13 In support of their motion, Defendants have submitted the declaration of N.
14 Grannis, the Chief of the Inmate Appeals Branch, describing all the administrative
15 grievance that Plaintiff has exhausted through the Director’s Level of Review. According
16 to her declaration, the first exhausted grievance by Plaintiff does not address the claims
17 raised herein; this grievance was exhausted in November 2001, long before the events
18 alleged in the instant case occurred. (Decl. N. Grannis, Ex. A at AGO-001.) Plaintiff did
19 not exhaust any further grievances until December 2003, 2007 and 2008. (Id.) As these
20 grievances were filed long after the Plaintiff filed the instant action, they do not satisfy
21 the exhaustion requirement. See McKinney, 311 F.3d at 1199 (action must be dismissed
22 unless prisoner exhausted available administrative remedies *before* he or she filed suit,
23 even if prisoner fully exhausts while suit is pending). As McKinney requires dismissal of
24 an action if administrative remedies have not been exhausted prior to filing suit,
25 Plaintiff’s to stay this action while he exhausts such remedies is DENIED.

26 Because Plaintiff failed to exhaust his administrative remedies with respect to his
27

28 ² Indeed, the November 22, 2002, grievance is the grievance that is alleged to have led
to Defendants’ retaliatory confiscation of his medication.

1 remaining claims prior to filing the instant action, Defendants' motion to dismiss the
2 complaint for failure to exhaust is GRANTED. See 42 U.S.C. § 1997e(a). As this case
3 will is dismissed for failure to exhaust, Plaintiff's request for appointment of counsel is
4 DENIED.

5 CONCLUSION


6 For the foregoing reasons, Defendants' motion to dismiss for failure to exhaust
7 administrative remedies (Docket No. 22) is GRANTED. Plaintiff's claims are
8 **DISMISSED** without prejudice to refile after Plaintiff has exhausted all available
9 administrative remedies. The motions for a stay (Docket No. 27) and for appointment of
10 counsel (Docket No. 20) are DENIED.

11 The Clerk shall enter judgment and close the file.

12 This order terminates Docket Nos. 20, 22 & 27.

13 IT IS SO ORDERED.

14 DATED: 8/21/08


JEREMY FOGEL
United States District Judge